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PETITION NOT PRINTED

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1960

No. 52

ELIJAH McNEAL, JR.,
Petitioner,

vs.

R. O. CULVER, as State Prison Custodian,
Respondent.

On Writ of Certiorari to the Supreme Court of the State of Florida

BRIEF FOR THE RESPONDENT

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BRIEF FOR THE RESPONDENT

PRELIMINARY STATEMENT

This cause was presented to the Supreme Court of Florida in an original habeas corpus proceeding on the basis of two definite issues of law; to-wit:

(1) Whether or not the trial court violated the petitioner's Constitutional rights, both State and Federal, in denying the petitioner the organic

Constitutional right to be furnished a copy of the Information entered against him.

(2) Whether or not the trial court violated the petitioner's Constitutional rights, both State and Federal, by denying him the right to representation by court appointed counsel as required by decisional rules and established law, as laid down by the Florida Supreme Court, and as held by the United States Supreme Court.

The first question, supra, was vigorously emphasized by petitioner in his initial petition, and staunchly supported in his reply brief to our original response. Since the question presented therein had never been directly passed upon by a Florida Appellate Court, and since your respondent reasonably interpreted said question to be the true foundation stone upon which the petitioner sought relief, it is herein conceded that the State's original response was primarily dedicated to said question. Our State Supreme Court disposed of this question upon the basis of evident waiver on the part of petitioner, as contemplated by *Howard v. State,* 146 Ala. 149, 41 So. 301 (Tr. 50-51).

In the instant proceedings, on certiorari, however, the petitioner has abandoned the first point presented in his original petition, and relies solely upon the second question, relative to his alleged right to counsel during his original trial. We shall endeavor to restrict our response accordingly.

QUESTION PRESENTED

(as rephrased)

WHETHER OR NOT THE PETITIONER WAS DENIED THE RIGHT TO COURT APPOINTED COUNSEL, AND IF SO, DID SUCH DENIAL CONSTITUTE A VIOLATION OF HIS CONSTITUTIONAL RIGHTS, BOTH STATE AND FEDERAL.

ARGUMENT

On February 24, 1959, this Court reversed the Florida Supreme Court's ruling previously filed in the case of *Cash v. Culver*, 358 U.S. 633, 3 L.Ed. 2d 557, 79 S.Ct. 432. The writ of habeas corpus in the instant case was issued by the Florida Supreme Court on April 17, 1959 (Tr. 15). Petitioner's reply brief was filed on May 23, 1959, in which he specifically relied upon *Cash v. Culver*, supra, for further consideration in the premises (Tr. 44, 46, 47). The opinion of the Florida Supreme Court in this cause was thereafter filed on July 1, 1959 (Tr. 49). It can therefore be assumed with confidence that the Florida Supreme Court arrived at its ultimate decision herein with this Court's tones of reversal ringing clearly in their judicial ears, and with the full knowledge that your mandate in *Cash*, supra, must be adopted and followed in like circumstances.

Thus, it is deemed necessary that the material elements in the instant case be measured by the exacting rule laid down in the Cash case.

McNEAL AND CASH COMPARED

All references to Cash herein are taken from *Cash v. Culver*, 3 L.Ed. 2d at pages 558-561. References to *McNeal* are taken from the transcript of record filed in these present proceedings, at the page indicated.

A. COMPARISON OF RECORDS BEFORE COURT

The record in Cash (before this Court) consisted only of the habeas corpus petition and the Florida Supreme Court's bare order of denial. Thus, all allegations of the petition were treated as true. *Hawk v. Olson*, 326 U.S. 271, 90 L.Ed. 61, 66 S.Ct. 116.

The record in McNeal, now before this Court, consists of the petition, response, reply brief, testimony produced at the original trial, certain pertinent parts of the trial record, opinion of the Florida Supreme Court, and petitioner's brief on certiorari.

B. COMPARISON OF AGES, EDUCATION AND EXPERIENCE

Cash was "an uneducated farm boy of 20", when his original trial began. (Burglary)

McNeal was a 29-year-old Negro man, a veteran of almost six years in the army; (Tr. 37) a G.I. student and employee at a nursery (Tr. 42-43).

C. COMPARISON OF INDICATIONS OF DOUBT

Cash was represented by able counsel of his own choice at his first trial, and the jury failed to convict, thus establishing a tangible practical indication of the difference a lawyer's help at the second trial might have been. He was not represented by counsel at his second trial, which resulted in a conviction.

McNeal's record discloses no such indication of his probable innocence.

D. OPPORTUNITY TO OBTAIN COUNSEL

Cash was placed in solitary confinement in the State Prison after his first trial, and had no opportunity to employ counsel to represent him at his second trial.

McNeal was arrested on the night of his offense, November 10, 1957 (Tr. 33). He was arraigned and plead not guilty. Thereafter, on February 26, 1958, he was convicted, and on March 31, 1958, he was sentenced (Tr. 22-23). Thus, McNeal had from November 10, 1957, until February 26, 1958, in which to secure counsel of his own choice. Petitioner does not allege, nor does the record reflect that he was in jail during this interval of more than three months, or that he was otherwise unable to secure the services of an attorney during such interval. On the contrary, the record indicates that petitioner was at liberty during such time, viz:

Q. *Do* you draw an army pension or something?

A. I *draw* compensation for the school, but the pension *was* cut off. (Tr. 42)

* * *

Q. What kind of work *do* you *do*?

A. *I work* at the nursery, Lake Garfield. (Tr. 43)

Thus the present tense utilization of petitioner's answers given to questions propounded during his trial indicates that he attended classes and worked at the nursery right up to the trial date.

E. COMPARATIVE ATTEMPTS TO OBTAIN COUNSEL

At the opening of Cash's second trial he informed the trial judge (his first opportunity) of his original lawyer's sudden withdrawal, and of his own youth and lack of education and courtroom experience, and asked the court for a *continuance* to give him time to *employ* a new lawyer, or in the *alternative* that the court appoint counsel for him.

McNeal's record fails to reflect or allege that he ever attempted to consult an attorney of his own choice, or that he was denied such opportunity. On the contrary, the record shows that his father and mother and a "big family" were living in Polk County, Florida, during these entire proceedings, with the single exception of his father's death in December, 1957 (Tr. 39, 40, 41). Thus, it is apparent that he had ample opportunity to consult counsel, either directly or through his family.

Further, McNeal's record fails to substantiate, either directly or indirectly, that he was denied counsel of his own choice *or* that he ever requested court appointed counsel and was denied same.

F. COMPARATIVE COMPLEXITIES OF OFFENSES CHARGED.

Cash was charged with burglary. McNeal was charged with assault with intent to commit murder in the first degree. Neither offense is prima facie "complex" but might become so in light of testimony proffered to substantiate same, as is usually the case in a burglary prosecution. The offense of burglary is one usually perpetrated in an atmosphere of stealth, under cover of darkness, or in other circumstances wherein eye witness detection is unlikely. The offense is seldom discovered until the burglars have had ample opportunity to flee the premises and safely stash or otherwise dispose of the proceeds of their ill-gotten gains. Thus, the detection and prosecution of such offenders nearly always involves evidence of a technical nature, including fingerprints, plaster foot or tire casts, complex inventories of the place burglarized . . . and other evidence which necessarily demands a knowledge of the laws of circumstantial evidence on the part of state and defense alike in any prosecution thereon. And finally, as in the Cash case, the state is rarely able to secure a conviction without the testimony of an accomplice, thus bringing into play the law relative to the testimony of an accomplice, as noted by this Court in Cash, supra.

Comparatively speaking, the offense of assault with intent to commit first degree murder is one that would not reasonably put a trial judge on prior notice that the issues involved would be complex. The very nature of this offense involves intent to do violent harm to the person of another, as opposed to their property, and as such, in almost every case there is one or more eye witnesses to the act, as indeed in the case at bar there were several. The usual defenses available are self-defense, accident, misfortune, or lack of intent. The only defense offered by McNeal was "lack of intent to kill," as reflected by his own testimony:

> "But I ask the mercy of the Court. I didn't at any time intend to kill anybody . . . I was in the army for almost six years, and I made expert with just about every weapon I fired, even a shotgun; and if I'd intended to kill a man, then I believe I would have killed him. I was *trying to scare them* and stop them from jumping on people." (Tr. 37-38)

Thus, it is evident that the jury gave McNeal the benefit of every doubt by removing from consideration the charge of assault with intent to commit murder in the first degree, and rendering its verdict on the lesser degree of assault with intent to commit murder in the second degree.

Murder in the second degree is defined in Section 782.04 Florida Statutes, as:

> The unlawful killing of a human being . . . when perpetrated by an act imminently dangerous to another, and evincing a depraved mind regardless of

human life, although without any premeditated design to effect the death of any particular individual.

The facts here clearly demonstrate that McNeal withdrew from a short-lived fist fight at the "Blue Chip" Tavern, went to his home, armed himself with a loaded shotgun, returned to the "Blue Chip" and fired point blank into a group of people, wounding some, but missing his intended victim.

Surely, such *uncontradicted* testimony speaks more clearly and loudly than any argument relative to the establishment of the necessary elements of the offense committed.

Thus, it is evident that the petitioner did utilize the only defense available to him, and further, that he was successful in this endeavor.

Your respondent therefore respectfully submits that the petitioner herein has been afforded every protection guaranteed to him under the Constitution of the United States and of Florida, as well as those specific guarantees contemplated by this Court in *Cash v. Culver*, supra; *Betts v. Brady*, 316 U.S. 455, 86 L.Ed. 1595, 62 S.Ct. 1252; *Uveges v. Pennsylvania*, 355 U.S. 437, 93 L.Ed. 127, 69 S.Ct. 184; *Rice v. Olson*, 324 U.S. 786, 89 L.Ed. 1367, 65 S.Ct. 989, and related cases, as well as those principles pronounced by the Supreme Court of Florida in *Sneed v. Mayo*, 66 So. 2d 865; *Myers v. State*, 94 So. 507 and *Johnson v. Mayo*, 28 So. 2d 585.

Your respondent recognizes the remaining issues contained in petitioner's brief relative to the conduct of the trial below, but submits, first, that these matters were not before the Florida Supreme Court in the original habeas corpus proceedings, and second, that such complaints here now registered for the first time, i.e.: alleged misconduct of trial judge and prosecutor, improper predicate to incriminating admissions, etc., are all proper matters for review on *appeal*, and are not proper subjects for consideration in habeas corpus proceedings.

> "The great writ of habeas corpus is a writ of right obtainable under our Constitution by all men who claim to be unlawfully imprisoned against their will. It is designed to test *solely* the legality of the petitioner's imprisonment, and *may not be used* as a substitute *for appeal.*" (Emphasis supplied) *Ex Parte Armos*, 93 Fla. 5, 112 So. 289; *Collingsworth v. Mayo*, Fla., 37 So. 2d 696.

The real issue herein, in its final analysis, boils down to an unsupported allegation that petitioner was arbitrarily denied court appointed counsel. In this regard such duty as may rest upon the Florida courts to furnish counsel in criminal cases less than capital arises by virtue of the Fourteenth Amendment to the United States Constitution, and it imposes no absolute requirement that counsel be furnished unless the accused is incapable of representing himself adequately at the trial on account of age, ignorance or lack of mental capacity. Whether any such incapacity exists is purely personal and is a factual issue which can be determined only by an examination and observation of the individual in question.

Where a trier of the facts has made a finding on the issue his finding will not be disturbed if supported by competent credible evidence.

By petitioner's own admission, whether true or fanciful, the trial judge below made a finding on such issue when he allegedly remarked: ". . . and you won't need a lawyer in this case . . ." (Tr. 2).

Petitioner has chosen to remark on page 21 of his brief: "The record shows a complete lack of concern for Elijah McNeal, Jr., until prison plagiarists filed his potent petition below."

In explanation of the source of McNeal's legal advice, he points out the *identical language* utilized in portions of McNeal's petition and the original petition of Cash, supra.

It should be noted that McNeal did not file his original petition herein until March 21, 1959, almost a month after this Court ruled favorably on Cash's petition, on February 24, 1959.

Thus, petitioner's remark, above quoted, should be more appropriately paraphrased to read:

"The record shows a complete lack of concern *on the part of Elijah McNeal* for his own circumstances, or for the circumstances surrounding his trial, *until* a prison plagiarist succeeded in his own behalf in reaching the ear of this court, whereupon petitioner promptly appropriated the tools of Cash to repair the suddenly imagined discrepancies in his own conviction."

The following quotation by Mr. Justice Sebring, of the Florida Supreme Court, as voiced in *Sneed v. Mayo*, supra, is deemed to be most applicable to this entire cause:

> "The increase in this type of litigation in the federal courts would suggest either an appalling abuse of constitutional rights in state criminal trials or a scandalous abuse of the privilege of the writ of habeas corpus. Manifestly, the latter is the situation. It is apparent from the decisions that the federal courts, out of a proper regard for the rights of the very few persons who have been convicted in state court trials in violation of constitutional rights, have permitted themselves to be burdened by thousands of groundless, if not fraudulent, claims, many of which have been conjured up by prisoners after years of imprisonment, and after witnesses who might have been in a position to refute such claims are no longer available."

In final support of respondent's argument herein, the sound and well written opinion of Mr. Chief Justice Thomas, rendered in this cause, reported in *McNeal v. Culver*, 113 So. 2d 381, and included in the record herein, transcript 49, is hereby adopted by reference, and made a part of the respondent's brief.

CONCLUSION

Your respondent respectfully submits, that upon the foregoing authorities cited and argument presented, the writ of certiorari heretofore issued in this cause should be quashed, and/or that the order of the Florida Supreme Court heretofore entered herein, be affirmed.

Respectfully submitted,

RICHARD W. ERVIN
Attorney General

ODIS M. HENDERSON
Assistant Attorney General
Counsel for Respondent

CERTIFICATE OF SERVICE

I hereby certify that I have on this date furnished a true and correct copy of the foregoing Brief to counsel for the petitioner, by depositing same in a United States Mail Box with first class postage prepaid, addressed to Sam Daniels, Esq., Attorney for the Petitioner, at his post office address at 1111 Brickell Avenue, Miami, Florida.

This _____ day of October, A.D. 1960.

_____

Of Counsel for Respondent

SUPREME COURT OF THE UNITED STATES

No. 52.—October Term, 1960

Elijah McNeal, Jr., Petitioner,
v.
R. O. Culver, as State Prison Custodian.

On Writ of Certiorari to the Supreme Court of the State of Florida.

[January 23, 1961.]

Mr. Justice Whittaker delivered the opinion of the Court.

Upon an information charging "Assault to Murder in the First Degree," petitioner was put to trial, without counsel, before a jury in a Florida court, was convicted of "Assault to Murder in the Second Degree" and sentenced to imprisonment for a term of 20 years which he is now serving. No appeal was taken, but within a year from his conviction petitioner filed a petition for a writ of habeas corpus in the Supreme Court of Florida.

In that rather inartfully drawn petition, prepared in the penitentiary, at least the following allegations were made with reasonable clarity: When brought before the court for trial, petitioner, an indigent, ignorant and mentally ill Negro then 29 years of age, advised the court that he was without, and unable to obtain, counsel to conduct his defense and asked that counsel be appointed to represent him. The judge declined to do so, saying (1) "[S]ince this is not a capital offense you are not entitled to a court appointed attorney," and (2) "you won't need a lawyer in this case." Immediately, a jury was impaneled, the trial began, and petitioner was left to conduct his own defense. But, having "never before appeared in any court on a felony, and not understand[ing] court procedure or know[ing] how to defend himself," petitioner was unable effectively to conduct and present his defense, and, in consequence, the court's

denial of his request for counsel deprived him of due process of law guaranteed by both the Florida and the United States Constitutions.

The Florida Supreme Court issued a provisional writ of habeas corpus directing respondent to make a proper return. Respondent's return denied that "petitioner's constitutional rights were violated by the court's alleged refusal to appoint counsel in his behalf," attached a copy of (1) a partial transcript of proceedings at the trial, (2) the judgment of conviction and sentence and (3) the commitment, and asserted that petitioner was being lawfully imprisoned under the latter document. Finding nothing "in this record of the trial to show whether or not any request was made of the trial judge to appoint counsel to aid petitioner in his defense," and believing "that the issues were [not] so complex, or the petitioner so young, ignorant and inexperienced, as to bring into play the exception to the rule requiring appointment of counsel only in capital cases and to require further inquiry into the procedures culminating in his conviction and sentence," the Florida Supreme Court, without any hearing upon petitioner's allegations, discharged the writ and remanded petitioner to custody. 131 So. 2d 381. We granted certiorari to determine whether the allegations in the habeas corpus petition, as supplemented by other portions of the record, are such as entitled him to a full hearing thereon, and, if so and if those allegations be found true, whether petitioner was denied due process of law guaranteed by the Fourteenth Amendment of the United States Constitution. 362 U. S. 910.

It is thoroughly settled that:

> "'Where the gravity of the crime and other factors—such as the age and education of the defendant, the conduct of the court or the prosecuting officials, and the complicated nature of the offense charged and the possible defenses thereto—render criminal pro-

ceedings without counsel so apt to result in injustice as to be fundamentally unfair,' the Constitution requires that the accused must have legal assistance at his trial." *Cash* v. *Culver*, 358 U. S. 633, 637, and cases cited.[1]

The record shows that petitioner was involved in a minor altercation with the proprietors—two men named Scurry—of what is referred to as a "jook," called the "Blue Chip," located in the "colored quarters" of Lake Wales, Florida, during the evening of December 10, 1957, and was ordered to leave the place, which he did. Soon afterward, petitioner, "without shirt or shoes" and armed with a shotgun, approached the "Blue Chip" and, although a number of persons, including one of the Scurrys, were standing on the sidewalk, petitioner fired the gun in their direction and some of the pellets struck the lower legs of four persons, but Scurry was not hit. City police officers immediately arrested petitioner. They stated that, in the course of transporting him to jail, petitioner said that "he was sorry he shot these other boys, he intended to kill Scurry." On this premise, petitioner was charged with and tried for "Assault to Murder in the First Degree."

Although the record does not disclose the extent of petitioner's education, there is abundant evidence that it was slight.[2] Moreover, the record shows that he suffered head injuries in the Army in 1952, and ever since has been subject to "blackout spells" when excited. For a period of months following April 8, 1956, he underwent treat-

[1] Such is the rule, in those circumstances, whether or not the accused requested the appointment of counsel. *Uveges* v. *Pennsylvania*, 335 U. S. 437, 441.

[2] The following statements, made by petitioner at his trial, are clear evidence of his lack of education: "when I gets excited, I blacks out"; "I had it because I throwed it down myself"; ". . . without no shirt and no shoes"; "I goes and gets pills."

ment for his mental condition in the Veterans Hospital at Bay Pines, Florida, and during four months of that period he was detained in the psychopathic ward. In October 1956, he was released, apparently to his mother as his guardian,[3] but he continued to return to the hospital to "get pills."

The record shows that petitioner was incapable of questioning witnesses and otherwise unable to conduct his defense. The State produced four witnesses—the complaining witness, Ellix Scurry, and three police officers. Petitioner asked two questions of the witness Scurry and obtained answers thereto. His third "question" was precluded by the judge, although not objected to by the State, because "that is testifying and it isn't time for you to testify." Petitioner asked no further questions of Scurry, did not cross-examine the other three witnesses, nor did he make a single objection during the trial. When the State rested, the judge said to petitioner: "All right, now, Elijah, that is the State's case. If you want to, you can take the stand and tell your side of it. If you don't want to, you don't have to . . . ." Petitioner then took the stand and, after mentioning his head injury, "blackout spells" and hospital treatment for his mental illness, testified that he must have suffered a "blackout spell" preceding and during the shooting incident as "that part is a complete blank," but that he is sure he did not "intend

[3] On this score petitioner testified:

"When I was in the hospital, I stayed over there four months locked in the ward, psycho part of it; and the four months I was over there, I had to stay in there locked up all the time. Mama was the only one that could come and see me. And, well, about the latter part of the four months he give me a weekend pass. He was trying me to see if I would come back.

"And I went home and I come back on time. And I asked mama to come and sign for me as that was the only way I could get back. I had to have a guardian to sign. And she come over there that day and begged the doctor to let me go home."

to kill anybody." He then attempted to put in evidence a doctor's statement which he said verified his claim of suffering "blackout spells." Although the State did not object, the judge said "This statement would not be admissible. You could put the doctor on and have him testify; we cannot admit any statement like this," and the statement was not received in evidence. At the conclusion of petitioner's testimony, the judge said to petitioner: "Now, Lige, if you had an attorney, he would argue the case before the jury" and advised petitioner that, if he desired, he could "plead [his] case." Petitioner replied: "Well, sir, I don't quite understand the meaning of that," and he did not make any argument to the jury.

These facts tend strongly to show that petitioner's ignorance, coupled with his mental illness and complete unfamiliarity with the law and court procedures, and the scant, if any, help he received from the court, made the trial fundamentally unfair.

In addition to this showing of petitioner's lack of education and mental illness and his consequent inability to defend himself, the record at least implicitly discloses a number of highly complex legal questions, beyond the comprehension of almost any layman.

The Florida assault law appears to be replete with distinctions and degrees. Mayhem, bare assault, assault and battery, aggravated assault and assault *with intent* to commit felony are all statutory offenses.[4] Assault *with intent* to commit felony—apparently the crime intended to be charged against petitioner—incorporates by reference all Florida felonies and the degrees thereof.[5] The

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[4] 2 Fla. Stat. 1957, p. 2800, §§ 784.01–784.06.

[5] 2 Fla. Stat. 1957, p. 2800, § 784.06, which provides:

"ASSAULT WITH INTENT TO COMMIT FELONY.—Whoever commits an assault on another, with intent to commit any felony punishable with death or imprisonment for life, shall be punished

Florida homicide statutes appear to create four separate offenses—manslaughter,[6] and murder in the first, second and third degrees.[7] In considering the interplay between homicide and assault with intent to commit felony, the Florida courts have held that, although one may be guilty of assault with intent to commit manslaughter, *Lassiter* v. *State*, 98 Fla. 370, 123 So. 735, there is no such thing as assault with intent to commit murder in the second or third degrees because—inasmuch as those crimes do not require a finding of "intent"—such would be "an assault with intent to commit an act without intent." *Tillman* v. *State*, 81 Fla. 558, 88 So. 377, 380.

To establish the requisite "intent" to commit any of the grades or degrees of unlawful homicide "it will not be sufficient to show that the killing, had it occurred, would have been unlawful, and a felony; but it must be found that the accused committed the assault with intent to take life, for, although an unintentional or involuntary killing may in some cases be unlawful, and a felony, no man can intentionally do an unintentional act; and without the intent the assault cannot be punished under this statute, even though the killing, had it been committed, would have amounted to a felony. . . ." *Williams* v. *State*, 41 Fla. 295, 26 So. 184, 185.

If, in firing the gun, petitioner did not have this felonious "intent to kill," his greatest possible crime would have been "Aggravated Assault"—an assault "with a deadly weapon, without intent to kill."[8] This is not an academic distinction, for 15 years' difference in punish-

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by imprisonment in the state prison not exceeding twenty years. An assault with intent to commit any other felony shall be punished to an extent not exceeding one-half the punishment which could have been inflicted had the crime been committed."

[6] 2 Fla. Stat. 1957, p. 2798, § 782.07.

[7] 2 Fla. Stat. 1957, p. 2797, § 782.04.

[8] 2 Fla. Stat. 1957, p. 2800, § 784.04.

ment is involved.* The only testimony in this record of "intent to kill" was that of the police officers who testified that while transporting him to jail on the night of the occurrence, petitioner stated that he "intended to kill Scurry." That testimony appears to have been admitted without the slightest inquiry as to whether the statement was freely and voluntarily made by petitioner. Admission of that crucial evidence, in those circumstances, shows a patent violation of the Florida law which renders inadmissible all admissions made to law officers by an accused while under arrest unless the State *affirmatively shows* that they were freely and voluntarily made. *Louette* v. *State*, 152 Fla. 495, 12 So. 2d 168; *Thomas* v. *State* (Fla. 1957), 92 So. 2d 621; *Williams* v. *State* (Fla. 1954), 74 So. 2d 797. These complex and intricate legal questions were obviously "beyond the ken of a layman." *Cash* v. *Culver, supra*, at 638.

Indeed, it is questionable whether such a crime as the one upon which petitioner was charged, tried and convicted—"Assault to Murder," not "Assault *with Intent* to Commit Felony"—actually exists under the Florida law, *Williams* v. *State, supra*, and it is equally uncertain whether the verdict, convicting petitioner of "Assault to Murder in the Second Degree," is sufficient to support the judgment in the light of 2 Fla. Stat. 1957, p. 2957, § 921.03, which contains the provision that "no judgment of guilty shall be rendered on a verdict unless the jurors clearly express in it a finding against the defendant upon the issue." See also *French* v. *State*, 96 Fla. 657, 118 So. 815.

Moreover, the record contains facts which would have instantly suggested to counsel that petitioner might have a good insanity defense. "[W]hen there is testimony of

*Five years is the maximum sentence for aggravated assault under § 784.04, whereas a 20-year sentence may be imposed for assault with intent to commit felony under § 784.06.

insanity sufficient to present a reasonable doubt of sanity the presumption [of sanity] vanishes. The defendant is then entitled to an acquittal if the state does not overcome the reasonable doubt." *Farrell* v. *State* (Fla. 1958), 101 So. 2d 130, 133. It is too much to expect this mentally ill petitioner effectively to raise and establish the defense of his own insanity, and, so far as this record shows, neither the prosecutor nor the trial court took any notice of the matter.

The question treated in the separate concurring opinion only lurks in the record, as it was not raised, briefed or argued here, and therefore we do not reach or express any views upon it.

For the totality of the reasons reviewed, due process of law required that petitioner have the assistance of counsel at the trial of this case, if the facts and circumstances alleged in his habeas corpus petition are true. On the present record it is not possible to determine their truth. But the allegations themselves made it incumbent on the Florida court to grant petitioner a hearing and to determine what the true facts are.

Reversed.

SUPREME COURT OF THE UNITED STATES

No. 52.—October Term, 1960.

Elijah McNeal, Jr., Petitioner, v. R. O. Culver, as State Prison Custodian. } On Writ of Certiorari to the Supreme Court of the State of Florida.

[January 23, 1961.]

Mr. Justice Douglas, whom Mr. Justice Brennan joins, concurring.

While I join the opinion of the Court, I rest also on another ground for reversal.

Nearly 19 years ago the Court held in *Betts* v. *Brady*, 316 U. S. 455, that a state court in a criminal case need not appoint counsel to represent an indigent defendant, unless the failure to furnish counsel results in a conviction lacking in "fundamental fairness." *Id.*, 473. That decision was by a divided Court; and six Justices now sit on the Court who had no hand in fashioning the rule.

I cannot believe that a majority of the present Court would agree to *Betts* v. *Brady* were it here *de novo*, especially in light of our unanimous decision in *Chandler* v. *Fretag*, 348 U. S. 3, 9, where we held that the right of a defendant in a state criminal trial "to be heard through his own counsel" is "unqualified." In that case an accused requested a continuance so that he could obtain a lawyer. We held it was reversible error for a state court to deny the request and to put the defendant to trial without counsel. We said that right to counsel turned, not on the nature of the crime charged, but on the importance of the presence of counsel to an accused's right to a hearing. We relied on *Powell* v. *Alabama*, 287 U. S. 45, 68–69:

> "The right to be heard would be, in many cases, of little avail if it did not comprehend the right to be

> heard by counsel. Even the intelligent and educated layman has small and sometimes no skill in the science of law. . . . He lacks both the skill and knowledge adequately to prepare his defense, even though he have a perfect one. He requires the guiding hand of counsel at every step in the proceedings against him." [1]

The result of our decisions is to refuse a State the power to force a person into a criminal trial without a lawyer if he wants one and can afford to hire one, but to deny the same protection to an accused who is too poor to retain counsel. This draws a line between rich and poor that is repugnant to due process. The need of counsel is the same, whatever the economic status of the accused. If due process requires that a rich man who wants a lawyer be allowed the opportunity to obtain one before he is tried, why should not due process give the same protection to the accused who is indigent? Even penniless vagrants [2] are at times caught in a tangle of laws that only an astute lawyer can resolve, as our own decisions show. *Edwards* v. *California*, 314 U. S. 160; *Edelman* v. *California*, 344 U. S. 357; *Thompson* v. *Louisville*, 362 U. S. 199.

Betts v. *Brady* requires the indigent, when convicted in a trial where he has no counsel, to show that there was fundamental unfairness. We have set aside a number of convictions so obtained, as our recent decision in *Cash* v. *Culver*, 358 U. S. 633, 636, n. 6, shows. Yet this is a heavy

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[1] For a scholarly account of an attempt in a contemporary society to abolish procedural safeguards and provide "simple" judicial systems see Hazard, Settling Disputes in Soviet Society (1960).

[2] The manner of administration of vagrancy laws and their harshness, due in part to the denial to the drifters in our midst of the procedural protections which others obtain, is vividly shown in Foote, Vagrancy Type Law and Its Administration. 104 U. of Pa. L. Rev. 603.

burden to carry, especially for an accused who has no lawyer and who cannot afford to hire one. It is a burden placed on an accused solely by reason of his poverty. Its only sanction is *Betts* v. *Brady* which is so at war with our concept of equal justice under law that it should be overruled.[3] Are we to wait to overrule it until a case arises where the indigent is unable to make a convincing demonstration that the absence of counsel prejudiced him?

[3] In *Erie R. Co.* v. *Tompkins*, 304 U. S. 64, Mr. Justice Brandeis, writing for the Court, overruled *Swift* v. *Tyson*, 16 Pet. 1. Mr. Justice Butler, speaking for himself and Mr. Justice McReynolds, strenuously objected, pointing out that the question had never been raised or argued, 304 U. S., at 82, 87, and asking that, before *Swift* v. *Tyson* was overruled, the case be put down for reargument. "It may not justly be assumed that the labor and argument of counsel for the parties would not disclose the right conclusion and aid the Court in the statement of reasons to support it." 304 U. S., at 88. But the problems created under the regime of *Swift* v. *Tyson* were as abundantly clear to the Court from its screening of hundreds of cases as are those which *Betts* v. *Brady* has spawned.

APPENDIX.

In 1942, MR. JUSTICE BLACK appended to his dissenting opinion in *Betts* v. *Brady*, 316 U. S. 455, 477, a compilation of the laws of the States regarding the right to appointment of counsel. This Appendix brings the classification down to date. Thirty-three States provide for appointment of counsel as of course on behalf of an indigent in any felony case; 17 States either make no explicit provision for appointment of counsel or make provision therefor only in capital cases or leave appointment of counsel to the discretion of the trial judge.

A. *Appointment of counsel for indigents in all felony cases, as of course, by force of the State Constitution, statutes, court rule, or judicial decision.*

Alaska: Rules of Criminal Procedure, Rule 39 (b).
Arizona: Rules of Criminal Procedure, Rule 163.
Arkansas: Ark. Stat. § 41-1203.
California: Calif. Penal Code § 987.
Connecticut: Gen. Stat. of Conn. (1958 Rev.) § 54-80. See *State* v. *Reid*, 146 Conn. 227.
Georgia: Ga. Const., Art. I, § 5 (Ga. Code Ann. § 2-105). See *Bibb County* v. *Hancock*, 211 Ga. 429.
Idaho: Idaho Code Ann. §§ 19-1512, 19-1513.
Illinois: Ill. Supreme Court Rules, Rule 26 (2), Ill. Rev. Stat. (1959), § 110.26 (2).
Indiana: Ind. Const., Art. I, § 13. See *State ex rel. Grecco* v. *Allen Circuit Court*, 238 Ind. 571.
Iowa: Iowa Code Ann. § 775.4.
Kansas: Gen. Stat. of Kansas (1959 Supp.) § 62-1304.
Kentucky: Ky. Const., Art. I, § 11. See *Calhoun* v. *Commonwealth*, 301 Ky. 789.
Louisiana: La. Rev. Stat. § 15-143.
Minnesota: Minn. Stat., 1957, § 611.07, as amended by Minn. Laws 1959, c. 383.
Missouri: Mo. Rev. Stat., 1949, § 545.820.

Montana: Rev. Code of Montana § 94–6512.
Nebraska: Rev. Stat. of Nebraska (1943) § 29–1803, as amended by Laws 1957, c. 104, § 1, c. 107, § 6.
Nevada: Nev. Rev. Stat. § 174.120.
New Jersey: N. J. Const., Art. I, ¶10; Rev. Rules, § 1:12–9.
New York: N. Y. Code of Criminal Procedure § 308.
North Dakota: N. D. Century Code § 29–01–27.
Ohio: Ohio Rev. Code § 2941.50.
Oklahoma: 22 Okla. Stat. § 464.
Oregon: Ore. Rev. Stat. § 135.320.
South Dakota: S. D. Code § 34.3506; S. D. Code (1960 Supp.) § 34.1901.
Tennessee: Tenn. Code §§ 40–2002, 40–2003.
Texas: Vernon's Texas Code of Criminal Procedure § 494, as amended by Acts 1959, 56th Leg., p. 1061, c. 484, § 1.
Utah: Utah Code Ann. § 77–22–12.
Virginia: Code of Va. § 19.1–241.
Washington: Rev. Code of Wash. § 10.01.110.
West Virginia: Rules of Practice for Trial Courts, Rule IV.
Wisconsin: *Carpenter* v. *Dane County*, 9 Wis. 274. See Wis. Stat. Ann. § 957.26.
Wyoming: Wyo. Stat. § 7–7.

B. *States not making provision for appointment of counsel for indigents in all felony cases.*

Alabama: Code of Ala., Tit. 15, § 318 (capital cases). See *Gilchrist* v. *State*, 234 Ala. 73.
Colorado: Colo. Rev. Stat. § 39–7–29. See *Kelley* v. *People*, 120 Colo. 1.
Delaware: Superior Court Rules, Rule 44 (capital cases and "any other in which the court deems it appropriate").
Florida: Fla. Stat. § 909.21 (capital cases). See *Watson* v. *State*, 142 Fla. 218.

Hawaii: Rev. Laws of Hawaii (1955) § 253-5, as amended by Laws 1957, c. 239 (in force after statehood, see Const., Art. XVI, § 2).

Maine: Me. Rev. Stat., c. 148, § 11 (capital cases and where sentence of life imprisonment may be imposed, otherwise permissive).

Maryland: Md. Rules of Procedure, Criminal Causes, Rule 723 (b) (in all capital cases and other "serious cases").

Massachusetts: Ann. Laws of Mass., c. 277, § 47 ("capital crime").

Michigan: Mich. C. Laws, 1948, § 775.16, as amended by Public Acts 1957, No. 256. See *People* v. *Williams*, 225 Mich. 133.

Mississippi: Miss. Code Ann. (rec. 1956) § 2505 ("capital crime").

New Hampshire: N. H. Rev. Stat. §§ 604:1, 604:2 (capital crimes or other cases where "injustice may be done if provision is not made therefor").

New Mexico: No provisions found.

North Carolina: N. C. Gen. Stat. § 15-4.1. See *State* v. *Davis*, 248 N. C. 318.

Pennsylvania: Purdon's Pa. Stat., Tit. 19, §§ 783, 784 (capital cases).

Rhode Island: Gen. Laws of Rhode Island § 12-15-3. See *State* v. *Hudson*, 55 R. I. 141; *Lee* v. *Kindelman*, 80 R. I. 212.

South Carolina: S. C. Code of Laws § 17-507 (capital cases). See *State* v. *Hollman*, 232 S. C. 489.

Vermont: 13 Vt. Stat. Ann. § 6503. See *State* v. *Gomez*, 89 Vt. 490.